

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. C 12-4350 SC
)	
SWINERTON BUILDERS and SWINERTON)	ORDER COMPELLING ARBITRATION,
INCORPORATED,)	STAYING CASE PENDING
)	ARBITRATION, AND GRANTING IN
Plaintiffs,)	PART DEFENDANTS' MOTION TO
)	<u>DISMISS</u>
v.)	
)	
AMERICAN HOME ASSURANCE CO.;)	
NATIONAL UNION FIRE INSURANCE)	
CO. OF PITTSBURGH, PA; and DOES)	
1-250, inclusive,)	
)	
Defendants.)	

I. INTRODUCTION

This is an insurance dispute. Now before the Court is Defendants American Home Assurance Co. ("American Home") and National Union Fire Insurance Co.'s ("National") (collectively "Defendants") motion to dismiss or, alternatively, to compel arbitration of Plaintiffs Swinerton Builders and Swinerton Incorporation's (collectively "Plaintiffs") complaint. ECF Nos. 9 ("FAC"), 33 ("Mot."). The motion is fully briefed. ECF Nos. 39 ("Opp'n"), 40 ("Reply"). The Court finds the motion suitable for decision without oral argument. Civ. L.R. 7-1(b). As explained

1 below, the Court GRANTS Defendants' motion to compel arbitration
2 and STAYS this case pending the completion of arbitration. The
3 Court also GRANTS in part Defendants' motion to dismiss Plaintiffs'
4 complaint.

5
6 **II. BACKGROUND**

7 Plaintiffs were the general contractors for the construction
8 and subsequent renovation of a residential development in Marina
9 del Rey, California (the "Project"). FAC ¶ 18. Defendants issued
10 two insurance policies (collectively the "Policies") that covered
11 the Project during the time relevant to Plaintiffs' complaint. Id.
12 ¶¶ 13-17. The first, issued by American Home, was a Commercial
13 General Liability Policy effective March 31, 2002 to March 31,
14 2003. Id. ¶ 13; id. Ex. A ("CGL Policy"). The second, issued by
15 National, was a Commercial Umbrella Policy effective March 31, 2000
16 to March 31, 2005. Id. ¶ 16; id. Ex. B ("Umbrella Policy"). The
17 CGL Policy required American Home to defend and indemnify
18 Plaintiffs for property damage arising out of operations at the
19 Project. Id. ¶ 14. Plaintiffs paid \$363,800 in premiums under the
20 CGL Policy. Id. ¶ 15. Plaintiffs allege that they satisfied the
21 CGL Policy's \$100,000 deductible. Id. The Umbrella Policy
22 required National to defend and indemnify Plaintiffs for property
23 damage arising out of operations at the Project after exhaustion of
24 the underlying CGL Policy. Id. ¶ 17.

25 In December 2008, the Homeowners Association for the Project
26 (the "HOA") sent Plaintiffs a "Notice to Builder" under California
27 Civil Code section 1375 (a "Calderon Notice"), identifying various
28 defects in the Project's waterproofing membrane, balcony railings,

1 and concrete foundations. Id. ¶ 19. Plaintiffs gave American Home
2 notice of the claim under the Policies. Id. ¶ 20. On February 9,
3 2009, in response to the Calderon Notice, American Home appointed
4 defense counsel for Plaintiffs, and in reliance on this
5 appointment, Plaintiffs did not obtain personal defense counsel,
6 undertake any repairs at the Project, or settle with the HOA. Id.
7 ¶ 21. In the following years, over various times, the Project was
8 subject to site inspections and forensic testing in order to
9 provide American Home with information about the Project's various
10 defects. Id. ¶¶ 22-24. After these tests, two mediations were
11 held, at which American Home refused to settle claims against
12 Plaintiffs. Id. ¶¶ 25-26.

13 The HOA sued Plaintiffs on May 3, 2011, for construction
14 defects (the "underlying case"). FAC Ex. D. Two more mediations
15 followed Plaintiffs' filing suit, but the parties reached no
16 settlement, even though Plaintiffs allege that at the fourth
17 mediation, on August 15, 2012, the HOA made reasonable settlement
18 demands within the combined policy limits of Defendants' Policies.
19 Id. ¶¶ 28-29. Though they refused the various settlement offers,
20 Defendants are defending Plaintiffs in the HOA's lawsuit. Id. ¶¶
21 27-32. Plaintiffs allege that Defendants had a duty to settle the
22 underlying case, and that Plaintiffs have overpaid their \$100,000
23 deductible for the Project. See id. ¶¶ 40-48.

24 Based on these allegations, Plaintiffs assert three causes of
25 action against Defendants: (1) breach of contract - failure to
26 settle; (2) breach of the implied covenant of good faith and fair
27 dealing - failure to settle; and (3) declaratory relief. Id. ¶¶
28 40-65. Defendants respond that Plaintiffs' claims are not ripe for

1 adjudication, because the underlying action is not yet resolved.
2 See Mot. at 1-2. Defendants add that even if the Court finds that
3 Plaintiffs' claims based on their alleged overpayment of the
4 deductible are ripe, the Court should compel arbitration of those
5 claims and stay this case pending the outcome of arbitration. Id.
6 at 2. The parties have a separate but practically identical case
7 still pending before this Court. Swinerton Builders v. American
8 Home Assurance Co., No. 12-cv-6047 EMC (the "Essex Case," named
9 after the underlying property in that case). The Essex Case
10 involved a separate construction defect claim. In that case, this
11 Court sent Plaintiffs' deductible-related claims to arbitration,
12 dismissed the remaining claims, and stayed the case pending
13 arbitration. Swinerton Builders, 2013 WL 1122022, at *2 (N.D. Cal.
14 Mar. 15, 2013) (dismissing claims); Swinerton Builders, 2013 WL
15 2237885, at *7 (N.D. Cal. May 21, 2013) (compelling arbitration).

17 **III. LEGAL STANDARDS**

18 **A. Motions to Dismiss**

19 A motion to dismiss under Federal Rule of Civil Procedure
20 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
21 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
22 on the lack of a cognizable legal theory or the absence of
23 sufficient facts alleged under a cognizable legal theory."
24 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
25 1988). "When there are well-pleaded factual allegations, a court
26 should assume their veracity and then determine whether they
27 plausibly give rise to an entitlement to relief." Ashcroft v.
28 Iqbal, 556 U.S. 662, 679 (2009). However, "the tenet that a court

1 must accept as true all of the allegations contained in a complaint
2 is inapplicable to legal conclusions. Threadbare recitals of the
3 elements of a cause of action, supported by mere conclusory
4 statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v.
5 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
6 complaint must be both "sufficiently detailed to give fair notice
7 to the opposing party of the nature of the claim so that the party
8 may effectively defend against it" and "sufficiently plausible"
9 such that "it is not unfair to require the opposing party to be
10 subjected to the expense of discovery." Starr v. Baca, 652 F.3d
11 1202, 1216 (9th Cir. 2011).

12 **B. Arbitration**

13 Section 4 of the Federal Arbitration Act ("FAA") permits "a
14 party aggrieved by the alleged failure, neglect, or refusal of
15 another to arbitrate under a written agreement for arbitration [to]
16 petition any United States district court . . . for any order
17 directing that . . . arbitration proceed in the manner provided for
18 in [the arbitration] agreement." 9 U.S.C. § 4. The FAA embodies a
19 policy that generally favors arbitration agreements. Moses H. Cone
20 Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).
21 Importantly, however, "[A]rbitration is a matter of contract and a
22 party cannot be required to submit to arbitration any dispute which
23 he has not agreed so to submit." United Steelworkers v. Warrior &
24 Gulf Navigation Co., 363 U.S. 574, 582 (1960). If such an
25 arbitration agreement is present, though, federal courts must
26 enforce it rigorously. See Hall Street Assoc., L.L.C. v. Mattel,
27 Inc., 552 U.S. 576, 581 (2008). Courts must also resolve any
28 "ambiguities as to the scope of the arbitration clause itself . . .

1 in favor of arbitration." Volt Info. Scis., Inc. v. Bd. of Trs. of
2 Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989).

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4 **IV. DISCUSSION**

5 **A. Plaintiffs' Unripe Claims**

6 The core of Plaintiffs' three causes of action is their
7 allegation that Defendants breached both their contract and the
8 implied covenant of good faith and fair dealing by refusing to
9 settle the claims in the underlying case. Defendants argue that
10 all of Plaintiffs' claims are premature, because Defendants are
11 defending Plaintiffs in the ongoing underlying case. Defendants
12 are right. Plaintiffs' claims based on Defendants' failure to
13 provide funding or authority to settle the underlying case are
14 unripe and must be dismissed.

15 "[A] claimant's action against the insurer [for breach of the
16 duty to settle] does not mature until a judgment in excess of the
17 policy limits has been entered against the insured." Hamilton v.
18 Maryland Cas. Co., 27 Cal. 4th 718, 725 (Cal. Ct. App. 2002).

19 "When, as here, the insurer is providing a defense but merely
20 refuses to settle, the insured has no immediate remedy. A cause of
21 action for bad faith refusal to settle arises only after a judgment
22 has been rendered in excess of the policy limits." Safeco Ins. Co.
23 v. Super. Ct., 71 Cal. App. 4th 782, 788 (Cal. Ct. App. 1999). The
24 rationale of this rule applies to both American Home, as primary
25 insurer, and National, as excess insurer: if there could be a
26 breach of the duty to settle prior to an excess judgment, insureds
27 could simply sue their insurers for breach of that duty, then
28 potentially obtain a settlement or judgment within the primary

1 insurance layer and suffer no cognizable damages. See
2 LensCrafters, Inc. v. Liberty Mut. Fire Ins. Co., No. C 07-2853
3 SBA, 2008 WL 410243, at *4 (N.D. Cal. Feb. 12, 2008).

4 Sometimes, as Plaintiffs note, an insured can bring a claim
5 based on an insurer's refusal to settle before an excess judgment
6 has been entered, but only when the insured has suffered damages
7 beyond exposure to a risk of liability in excess of policy limits
8 (e.g., damage to business reputation). See Opp'n at 10-14.
9 However, Plaintiffs' pleadings and arguments in favor of the
10 Court's granting them this exception are conclusory and therefore
11 insufficient to survive Defendants' motion to dismiss. Iqbal, 556
12 U.S. at 678; see also Swinerton Builders, 2013 WL 1122022, at *2
13 (N.D. Cal. Mar. 15, 2013) (finding same). No judgment has been
14 entered in the underlying case. Accordingly, Plaintiffs' claims
15 based on Defendants' alleged breaches of the duty to settle are all
16 DISMISSED as unripe.

17 Defendants also argue that all of Plaintiffs' claims based on
18 alleged overpayment of their deductible are unripe, because the CGL
19 Policy explicitly states that American Home's obligation to
20 indemnify Plaintiffs for damages only applies in excess of the CGL
21 Policy Schedule's stated deductible amounts. Mot. at 10-11; CGL
22 Policy at 36-37. According to Defendants, deductible amounts
23 cannot be calculated until the duty to indemnify attaches, i.e.,
24 after the case resolves and covered damages are determined -- a
25 matter distinct from the duty to defend. Mot. at 11. Therefore,
26 Defendants conclude that Plaintiffs' deductible-based claims are
27 unripe, just as their claims for breach of the duty to settle are.
28 Id. However, as this Court found in the parties' parallel case,

1 the parties' dispute over deductibles does not concern Defendants'
2 duty to indemnify Plaintiffs for an undetermined amount: Plaintiffs
3 have alleged that they have satisfied their \$100,000 deductible and
4 are due reimbursement of the excess payments. See Compl. ¶ 53(f);
5 Swinerton Builders, 2013 WL 1122022, at *3. Therefore Plaintiffs'
6 claims based on the deductible dispute are ripe. The next issue is
7 accordingly whether an arbitration agreement governs the parties'
8 dispute over deductibles.

9 **B. Arbitration**

10 The Policies themselves have no arbitration clause.
11 Underlying the parties' dispute over whether arbitration is
12 required in this case is a Letter of Understanding that Plaintiffs
13 and National entered on August 2009, to outline the process
14 Plaintiffs and National would follow to resolve outstanding
15 insurance-related disputes "associated with the 3/31/00 - 3/31/05
16 Rolling Contractor Controlled Insurance Program (Swinerton Wrap
17 Up)." ECF No. 32 ("Derewitz Decl. ISO Mot.") Ex. B ("LOU"). The
18 parties do not explain what exactly the Swinerton Wrap Up is. The
19 LOU also contains an agreement between the parties to arbitrate
20 "any dispute between the Parties with reference to the
21 interpretation, application, formation, enforcement or validity of
22 this memorandum, or their right with respect to any transaction
23 involved, whether such dispute arose before or after the
24 termination of this memorandum." LOU at 1.

25 Plaintiffs deny that the LOU covers their dispute over the
26 deductible. They ask the Court to admit and consider extrinsic
27 evidence of a Payment Agreement and the supplemental and original
28 declarations of John Capener, which Plaintiffs contend will clarify

1 that the LOU is irrelevant in this case. See Opp'n at 14-18; ECF
2 No. 39-1 ("Fanning Decl.") Exs. 1 ("Suppl. Capener Decl. & Payment
3 Agreement), 2 ("Capener Decl."). The Payment Agreement is an
4 unexecuted contract from March 2000 between the parties that
5 contains an arbitration clause governing deductibles, which
6 Plaintiffs state would have covered the present dispute if it had
7 been signed. Opp'n at 16-17; Suppl. Capener Decl. at 2. Both
8 Capener Declarations state that Mr. Capener, Swinerton
9 Incorporated's Senior Vice President and Director of Risk Services,
10 refused to sign agreements like the Payment Agreement, which
11 governed deductibles to be charged to Plaintiffs. Suppl. Capener
12 Decl. at 2; Capener Decl. at 2-3. Plaintiffs also argue that the
13 LOU identifies five specific transactions, which do not include
14 deductible disputes. Capener Decl. ¶¶ 6-7.

15 In response to all of these arguments, Defendants offer the
16 declaration of Stephen Lidz, who in the summer of 2009 was the
17 Senior Vice President of the Construction Risk Management division
18 responsible for Plaintiffs' primary insurance programs, including
19 the Swinerton Wrap Up program. ECF No. 35 Ex. A. ("Lidz Decl.") ¶
20 1. Mr. Lidz states that the LOU was meant to apply broadly to
21 Plaintiffs' "obligation to reimburse and fund future paid losses
22 within the program deductible." Id. ¶ 8. Defendants conclude that
23 the FAA's presumption in favor of arbitration, Mr. Lidz's
24 interpretation of the LOU, and the disputed admissibility of
25 Plaintiffs' evidence count in favor of arbitration here. Reply at
26 8-12.

27 The Court finds no reason to depart from the rulings on this
28 issue in the Essex Action. There, this Court found that the LOU

1 explicitly provides for the arbitration of the question of
2 arbitrability -- a threshold dispute here. Swinerton Builders,
3 2013 WL 2237885, at *4-6. Nothing has changed since then.
4 Plaintiffs' disputed evidence is not persuasive, and the LOU's
5 language sends to the arbitrators the questions of both the LOU's
6 coverage and the parties' dispute over arbitration.

7 Apart from their above arguments on the LOU's scope and
8 interpretation, Plaintiffs retain their arguments that bad faith
9 claims are not arbitrable. Opp'n at 23-24. Plaintiffs cite
10 several cases in support of this argument, but these cases are
11 inapposite because they were either limited to their facts or
12 simply not supportive of Plaintiffs' arguments. Opp'n at 23-24.
13 No other arguments remain.

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1 **V. CONCLUSION**

2 As explained above, Plaintiffs Swinerton Builders and
3 Swinerton Incorporated's claims premised on Defendants American
4 Home Assurance Co. and National Union Fire Insurance Co.'s alleged
5 breach of the duty to settle are DISMISSED. The Court GRANTS
6 Defendant's motion to stay this action pending the completion of
7 arbitration, and COMPELS the parties to proceed with arbitration in
8 accordance with the Letter of Understanding. This case is STAYED
9 pending the outcome of that arbitration.

10 The Court DENIES Plaintiffs' request to amend their complaint,
11 because Plaintiffs do not specify what new facts they could allege
12 to cure the defects that warranted dismissal. See Opp'n at 24-25.

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14 IT IS SO ORDERED.

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16 Dated: July 23, 2013



UNITED STATES DISTRICT JUDGE